

OCT 10 1990

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA

WARREN L. TADLOCK, CLERK

In Re:

NANTAHALA VILLAGE, INC.,

Debtor.

Case No. B-B-90-20449
Chapter 11

AND

In Re:

NANTAHALA VILLAGE, INC.,

Debtor.

Case No. B-B-90-20449
Chapter 11

NANTAHALA VILLAGE, INC.,

Plaintiff,

v.

NCNB OF FLORIDA, a National
Banking Association, and
FRED H. MOODY, JR.,

Defendants.

Adversary Proceeding
No. 90-0208

**ORDER GRANTING THE MOTION OF NCNB NATIONAL BANK
OF FLORIDA FOR THE SALE OF THE DEBTOR'S PROPERTY,
GRANTING THE MOTION OF NCNB NATIONAL BANK OF FLORIDA
FOR RELIEF FROM THE AUTOMATIC STAY, AND HOLDING IN ABEYANCE
THE MOTION OF NCNB NATIONAL BANK OF FLORIDA FOR DISMISSAL**

This matter is before the court on the motion of NCNB National Bank of Florida ("NCNB") for: (1) Dismissal of the debtor's voluntary Chapter 11 petition for lack of good faith in its filing; (2) alternatively, the appointment of a trustee or receiver to sell the debtor's property, the Nantahala Village

Resort (hereafter "the Resort"); and (3) relief from the automatic stay.

These motions -- or various parts of them -- were heard on several occasions in an attempt to accommodate the parties and to effect their now-aborted settlement of the matter. After a final hearing on all pending motions, all issues raised by these motions are presently before the court and ripe for disposition. Having considered all of the evidence and arguments of counsel offered on these motions, the court has concluded that sufficient bases exist to dismiss the debtor's petition and to grant NCNB relief from the automatic stay. The court has concluded, however, that in lieu of dismissing the debtor's petition and thus relegating the parties to the pursuit of their non-bankruptcy remedies, the most appropriate relief in the circumstances of this case is for the court to grant NCNB relief from the automatic stay and to order the sale of the Resort. The court, therefore, will grant NCNB's motion for the sale of the Resort in both the base case and the related adversary proceeding, will grant NCNB's motion for relief from the automatic stay, and will hold in abeyance the entry of a final order granting NCNB's other pending motion to dismiss.

BACKGROUND FACTS AND PROCEDURAL HISTORY

The debtor, Nantahala Village, Inc. (hereafter "Nantahala Village"), owns and operates the Resort which is located near Lake Fontana in Swain County in the mountains of western North Carolina. The Resort is open for business and generates revenue

from May through October, but is not open and generates no revenue during the remaining winter months. Nantahala Village typically has paid its expenses during the winter months from the revenue received during the summer months and from loans from its principal, Mr. Robert A. Riedel. Because of the nature of the Resort and its location, Nantahala Village has only a seasonal lease on property connected to the Resort and has only seasonal employees, who are not covered by any collective bargaining agreement.

Riedel first acquired an interest in Nantahala Village in 1958. A hotel management company principally owned by Riedel, Management Resources, Inc. (hereafter "Management Resources"), operates the Resort and performs many administrative functions for the Resort, such as payroll, bookkeeping, budgeting, and marketing.

Because of a desire to improve the Resort through renovation of the existing facility and construction of additional facilities, Nantahala Village approached NCNB for a loan in 1986. Nantahala Village attempted to negotiate a twenty-five year amortization of its note. Before receiving a financing commitment from NCNB, however, Nantahala Village entered construction contracts for improvements at the Resort. NCNB subsequently refused to give Nantahala Village a loan with a twenty-five year amortization schedule. NCNB, instead, loaned Nantahala Village in August 1986 \$1.4 million with monthly payments of approximately \$18,000 over a fifteen-year amortization period. Nantahala

Village executed a promissory note in that amount, a deed of trust giving NCNB a lien on the Resort, and a security agreement covering personal property located at the Resort and rents and profits at the Resort. Riedel and his wife personally guaranteed the payment of the debt to NCNB.

In August 1988, NCNB and Nantahala Village renegotiated the terms of the note because of Nantahala Village's inability to service its debt to NCNB. Nantahala Village executed another promissory note, dated August 30, 1988, that had a principal amount of \$1,263,240.87 and that was secured by the same liens as the previously executed note. The August 30, 1988 note required Nantahala Village to make stated monthly interest payments to NCNB and to pay the entire principal amount by August 1, 1989. NCNB and Nantahala Village agreed on this one-year term for repayment to provide Nantahala Village with one year to sell the Resort. Nantahala Village actively began trying to sell the Resort in March 1989. Nantahala Village initially offered the Resort at a price of in excess of \$2 million, but repeatedly has reduced the asking price. Riedel recently indicated Nantahala Village's willingness to accept \$1.5 million for the Resort. Nevertheless, Nantahala Village has failed to sell the Resort.¹

¹ In April 1989, Nantahala Village entered into a purported "sale" of the Resort. Nantahala Village and the purported purchaser, however, never consummated the April 1989 sale. Nantahala Village presently is litigating an action filed against the purported purchaser of the Resort for, among other things, specific performance.

Nantahala Village also failed to repay NCNB according to the terms of the note. NCNB, therefore, sought to initiate foreclosure proceedings in Swain County Superior Court. By order of January 26, 1990, the Clerk of Swain County Superior Court authorized the foreclosure. Nantahala Village appealed the January 26, 1990 order and contested the validity of the foreclosure proceedings. Nantahala Village argued that NCNB should have given it a loan with a twenty-five year amortization period, rather than a loan with a fifteen-year amortization period.² On March 18, 1990, the Honorable James W. Downs denied Nantahala Village relief and entered an order authorizing a foreclosure sale of the Resort.

On April 6, 1990, Nantahala Village filed in state court a civil action seeking to enjoin the foreclosure sale. On April 10, 1990, a foreclosure sale occurred at which the Resort was sold. On April 16, 1990, NCNB timely removed the state court action to the United States District Court for the Western District of North Carolina. On April 18, 1990, Nantahala Village's board of directors, through Riedel, authorized Nantahala Village to file a bankruptcy petition, which immediately was prepared for filing. However, on April 19, 1990, before the statutory ten-day upset bid period expired, the Honorable Richard Voorhees temporarily prohibited the delivery of the deed of

² Nantahala Village also raised these same allegations in a Florida state court action filed against NCNB. The Florida state court dismissed Nantahala Village's complaint. Nantahala Village has appealed the dismissal.

trust. Judge Voorhees subsequently appointed a receiver over the Resort, directed Nantahala Village to post bonds, directed the receiver specially to advertise the sale of the Resort, and ordered the Resort resold on or before June 30, 1990. A foreclosure sale was noticed for 11:00 a.m. on June 29, 1990. At approximately 9:30 a.m. on June 29, 1990, Nantahala Village filed a voluntary Chapter 11 bankruptcy petition.

Since the filing of the Chapter 11 petition, Nantahala Village has remained in possession of, and continues to operate, the Resort. Nantahala Village is paying its current operating expenses. Pursuant to this court's order, the receivership established by Judge Voorhees has been continued to protect NCNB's security interest in rents and to control Nantahala Village's use of cash receipts. Also pursuant to this court's order, Nantahala Village must make monthly adequate protection payments of approximately \$10,000 to NCNB.

On July 5, 1990, NCNB filed its motion for dismissal of Nantahala Village's voluntary Chapter 11 petition and for relief from the automatic stay. On July 16, 1990, Nantahala Village filed its response to NCNB's motion. The court conducted a preliminary hearing on NCNB's motion for dismissal on July 18, 1990. On August 22, 1990, NCNB filed an amendment to its motion for dismissal seeking the alternative relief of the sale of the Resort either by the existing receiver or by a court-appointed trustee. Then, after granting two continuances at the debtor's request, the court conducted another hearing on September 12,

1990, at which it heard testimony and oral argument on NCNB's motion for dismissal.³ On September 20, 1990, the court held a recorded decisional conference at which it indicated its belief that sufficient grounds existed to justify the dismissal of Nantahala Village's Chapter 11 petition. The court then scheduled a hearing for October 2, 1990, to consider the other relief sought by NCNB. At Nantahala Village's request, the court continued the October 2, 1990 hearing until October 3, 1990. On October 3, 1990, NCNB and Nantahala Village reported a settlement of the entire matter and placed the terms of the settlement on the record. NCNB and Nantahala Village, however, have been unable to agree on the terms of a consent order and have informed the court that the settlement has been aborted. The court, therefore, calendared a final hearing for all pending motions for October 18, 1990. From the testimony heard at the hearings and the documents admitted into evidence, the court has learned the following additional facts.

The testimony of Riedel revealed the following additional facts. Riedel has been involved in hotel management since 1947, has worked for several hotels since that time, and evidently has been quite successful. While involved in hotel management, Riedel has gained experience in taking over financially troubled hotels and making them profitable. In addition to working in the

³ Before the September 12, 1990 hearing, NCNB and Nantahala Village agreed that the subject of the hearing would be only NCNB's motion for dismissal and that NCNB would defer the pursuit of its other relief.

private sector, Riedel also has served as the Hotel and Restaurant Commissioner for the State of Florida and as the Director of the Florida Securities Commission.

After investing in the Resort with a group of associates in 1958, Riedel eventually purchased a majority of the ownership interests of his associates and converted the Resort into essentially a family-owned entity. Riedel now has an eighty percent ownership interest in Nantahala Village. Historically, Nantahala Village has funded its operations during the winter months through Riedel's ability to borrow funds from NCNB. Nantahala Village subsequently would repay Riedel during the summer months when revenues were received.

Nantahala Village last made a payment on its note to NCNB in either October or November of 1989. During the winter of 1989-1990, however, Nantahala Village was not able to service its debt to NCNB. Moreover, Riedel was unable to borrow money to fund Nantahala Village for the winter of 1989-1990. After NCNB initiated foreclosure proceedings on the Resort, Nantahala Village for the first time considered filing a bankruptcy petition. On April 18, 1990, two days before the originally scheduled foreclosure sale, the Nantahala Village board of directors authorized the filing of a Chapter 11 bankruptcy petition. After the foreclosure sale occurred, Nantahala Village received from the United States District Court temporary relief from the transfer of the deed on the Resort. The United States District Court later refused to extend its relief to Nantahala Village and

ordered that another foreclosure sale take place before June 30, 1990. On June 29, 1990, less than two hours before the noticed foreclosure sale, Nantahala Village then filed its Chapter 11 petition. By filing the Chapter 11 petition, Nantahala Village wanted additional time to sell the Resort after the United States District Court had denied a request for additional time to sell the Resort. Additionally, Riedel wanted to protect his equity in the Resort that would be lost if the foreclosure sale occurred. Immediately before the filing of the Chapter 11 petition, however, Nantahala Village paid its indebtedness of approximately \$25,000 to Management Resources and made several payments to the law firm representing it and the accounting firm handling its financial records.

Mr. Jeffrey Gould, the court-appointed receiver of Nantahala Village, testified about the current financial condition of Nantahala Village. Mr. Gould admitted that Nantahala Village is a going concern and able to pay its current operating expenses and trade creditors. Mr. Gould noted, however, that Nantahala Village would not be able to service its debt to NCNB between October 1990 and June 1991.

Mr. Robert C. (Burt) Riedel, Robert Riedel's son, testified that he has a fourteen percent ownership interest in Nantahala Village and also is associated with Management Resources. Burt Riedel provided projections of Nantahala Village's future financial outlook. Based on his review of the corporate records, Burt Riedel projected essentially that if not required to make any

payments until June 1991, Nantahala Village could begin making regular monthly payments to NCNB, based on a twenty-five year amortization schedule. Burt Riedel based his projections on several assumptions, including that Nantahala Village would incur only \$20,000 in attorneys' fees between the filing of the Chapter 11 petition and the confirmation hearing. Burt Riedel's projections, however, ignore four important points: First, that the court has ordered Nantahala Village to make monthly adequate protection payments of \$10,295.24; second, that Robert Riedel has admitted that Nantahala Village needs to incur capital expenditures of nearly \$350,000 to keep the property from deteriorating and the future income flowing to Nantahala Village; third, that Nantahala Village already has incurred in excess of \$20,000 in legal fees and expenses; and, fourth, that although the interest rate on the court-ordered adequate protection payments is 10.5%, the default interest rate on the note is 25%, which difference results in a \$417 per day deficiency of payments due NCNB under the express terms of the note.

DISCUSSION

I. NCNB'S MOTION FOR DISMISSAL

NCNB has moved for dismissal of the debtor's Chapter 11 petition because it was not filed in "good faith." The basic framework for considering NCNB's motion for dismissal was established by the Fourth Circuit in Carolin Corp. v. Miller, 886 F.2d 693, 694 (4th Cir. 1989). In Carolin, the Fourth Circuit held that:

[A] bankruptcy court may dismiss [a voluntary Chapter 11 bankruptcy] petition for want of good faith in its filing, but only with great caution and upon supportable findings both of the objective futility of any possible reorganization and the subjective bad faith of the petitioner in invoking this form of bankruptcy protection.

Id. at 694. In establishing this principle, the Fourth Circuit acknowledged that the Bankruptcy Code does not contain a specific good faith filing requirement for Chapter 11 cases. Id. at 698. The Carolin court reasoned, however, that because of the broad policy considerations of the Bankruptcy Code and the language of several provisions of the Bankruptcy Code and of the Bankruptcy Rules, a debtor's good faith was an implicit requirement for the filing of a Chapter 11 petition. Id.

Although recognizing a bankruptcy court's authority to dismiss a Chapter 11 bankruptcy petition for lack of good faith in filing, the Fourth Circuit in Carolin admonished bankruptcy courts to use great care and caution in exercising the power to dismiss. Id. at 700. The Fourth Circuit warned bankruptcy courts to remember that the Bankruptcy Code provides creditors of Chapter 11 debtors with remedies such as relief from stay, adequate protection, and dismissal or conversion under 11 U.S.C. § 1112(b), and that courts should not use dismissal for lack of good faith in filing as an easy alternative to creditors' other post-petition statutory remedies. Id. The Fourth Circuit recognized that by using dismissal as an alternative to the statutory remedies, courts would be subverting the reorganization scheme envisioned in the Bankruptcy Code. Id.

The Fourth Circuit in Carolin adopted a two-pronged test for bankruptcy courts to apply in considering whether to dismiss a Chapter 11 petition for lack of good faith in filing. Id. at 700-01. The Carolin court required a showing of both objective futility and subjective bad faith in filing before a court properly could dismiss a Chapter 11 petition for lack of good faith. Id. The court noted that in applying the two-pronged test, a court should attempt to determine whether allowing the Chapter 11 petition to proceed past filing would further the purposes of the Bankruptcy Code. Id. at 701. In adopting the two-pronged test, the Fourth Circuit noted that courts should inquire into objective futility to insure that the bankruptcy proceeding will in some way be related to revitalizing a financially troubled debtor. Id. at 701. The Carolin court directed courts to focus on determining whether there exists a going concern to preserve and whether there exists any hope of rehabilitation. Id. The Fourth Circuit noted, further, that courts should inquire into the debtor's subjective bad faith to insure that the debtor actually intends to use the provisions of Chapter 11 to reorganize an existing enterprise or to preserve going concern values of an existing business. Id. at 702. The Fourth Circuit in Carolin stated that the subjective bad faith inquiry would allow courts to determine whether the debtor's real motive in filing a Chapter 11 petition was to abuse the reorganization process and to delay creditors through the automatic stay without any intent or ability to reorganize its activities. Id.

The Fourth Circuit in Carolin noted that in applying the two-pronged test, courts should inquire into the totality of the circumstances surrounding the filing. Id. at 701. The Fourth Circuit also stated that courts should not rely on any list of factors and that no single factor necessarily would lead to a finding of lack of good faith in filing. Id.

Courts other than the Fourth Circuit have considered the dismissal of a Chapter 11 petition for lack of good faith in filing and have recognized that courts should consider the totality of the circumstances surrounding the filing of the bankruptcy petition. See Little Creek Devel. Co. v. Commonwealth Mortgage Corp. (In re Little Creek Devel. Co.), 779 F.2d 1068 (5th Cir. 1986); In re L'Puente Ltd. Partnership, 104 Bankr. 503 (Bankr. S.D. Fla. 1989); In re Mill Place Ltd. Partnership, 94 Bankr. 139 (Bankr. Minn. 1988); In re Krilich, 87 Bankr. 178 (Bankr. M.D. Fla. 1988); North Central Devel. Co. v. Landmark Capital Co. (In re Landmark Capital Co.), 27 Bankr. 273 (Bankr. Ariz. 1983).

The many factors considered by these courts include, inter alia, the number of assets belonging to the debtor; the degree to which the debtor has encumbered its assets; the number of employees of the debtor, excluding its principals; the adequacy of the debtor's cash flow; the number and amount of the debtor's unsecured claims relative to its secured claims; the existence of a foreclosure proceeding on the debtor's encumbered assets; and the realistic possibility of an effective reorganization.

In applying these principles to the facts of this case, the court can conclude only that the debtor's petition is subject to dismissal for lack of good faith because of, first, the objective futility of any possible reorganization and, second, the debtor's subjective bad faith in filing its petition.

Congress designed Chapter 11 of the Bankruptcy Code "to prevent the waste and reduction in asset values that result from unnecessary liquidation. Congress meant to encourage financial restructuring and to reestablish efficient business operations." In re Sirius Systems, Inc., 112 Bankr. 50, 52 (Bankr. D.N.H. 1990) (quoting In re Schlangen, 91 Bankr. 834, 837 (Bankr. N.D. Ill. 1988)). The essence of Chapter 11, thus, is business reorganization. Id. (quoting In re Harvey Probber, Inc., 44 Bankr. 647, 650 (Bankr. D. Mass. 1984)). The inquiry into the possibility of reorganization must ascertain the existence of a going concern needing preservation and the realistic hope of rehabilitation, rather than a possibility of rehabilitation based solely on the debtor's "terminal euphoria." Carolin, 886 F.2d at 701; see Little Creek, 779 F.2d at 1073.

Even after giving the debtor the benefit of all doubts and resolving any real conflicts in its behalf, the court cannot find that there is any realistic possibility that Nantahala Village successfully can reorganize.

Nantahala Village's post-borrowing history clearly demonstrates its past inability to pay its debt to NCNB. Even in the best of years, the debtor, Nantahala Village, was unable to

service its debt to NCNB during much of the year. To avoid default on its debt during its off-season, Nantahala Village had to be supplemented by other borrowings by its principal, Riedel. When Riedel no longer could rely on his other source of credit to fund NCNB, Nantahala Village quickly went into default on its obligation to NCNB and has remained in default since that time.

Furthermore, Riedel essentially has admitted Nantahala Village's financial mistake in binding itself to repay NCNB on a fifteen-year amortization schedule. Riedel admitted that when Nantahala Village borrowed from NCNB in August 1986, he knew that Nantahala Village could not operate successfully with the fifteen-year amortization schedule, which was the only schedule on which NCNB would lend funds to Nantahala Village. Nevertheless, Nantahala Village and Riedel committed themselves to a loan with a fifteen-year amortization schedule. Riedel was right then and is right now. Nantahala Village has not shown any prospects for other lenders, for any restructuring of its debt, or for any infusion of new capital. Further, Nantahala Village has not shown any realistic prospect that it can operate successfully to enable it to repay its indebtedness to NCNB.

Moreover, Nantahala Village's projections for its proposed reorganized operations contain several fundamental flaws.⁴ Be-

⁴ The debtor requested a continuance or postponement of the hearing on NCNB's motion because of the absence of its accounting witness. The court denied the debtor's request, but believes that the debtor was not prejudiced by the absence of its accountant. Other members of the same accounting firm, one of whom had testified at an earlier hearing, were available to testify. Moreover, the witness who offered the projections, Burt

cause of the fundamental flaws, the projections are insufficient to support a finding of any realistic prospects for reorganization. First, under the debtor's projections, NCNB is paid nothing for the next nine months. Second, the debtor's projections omit numerous expenses, including both operating and capital expenses. In fact, some actual expenses, although known when the projections were made, were omitted. Third, Nantahala Village has based its projections on "cramming down" on NCNB a loan payment plan which NCNB specifically rejected in arm's lengths negotiations and for which the debtor has little, if any, likelihood of establishing that the plan is fair and equitable to NCNB. The only conclusion that reasonably can be drawn from the projections is that Nantahala Village cannot operate the Resort and pay its expenses and its debt. In fact, ignoring its debt to NCNB, Nantahala Village can only barely operate the Resort.

Finally, Nantahala Village's attempt to present a prospect for reorganization appears constructed primarily for the purpose of defeating NCNB's motion. Nantahala Village obtained the August 1988 loan modification in order to get a year to sell the Resort. The debtor embarked upon efforts to sell the Resort before filing for bankruptcy and, in fact, contracted for an apparent sale of the Resort in a transaction that never was consummated. After the failed transaction, Nantahala Village has

Riedel, did as professional a job as was possible. The debtor's problems in this regard are not related to its witness, but to the absence of facts from which a successful reorganization could be projected.

reduced its asking price for the property in order to attract a buyer. All of its projections for operation of the Resort appeared to be prepared solely for the hearing on this matter and were not ordinary business plans.

From all of the above, the court must find that there is no objective and realistic possibility of a successful reorganization of this debtor. Instead, the only possibility of rehabilitation is based solely on the debtor's terminal euphoria.

Moreover, Nantahala Village has not offered substantial evidence or argued that it might successfully "reorganize" by liquidating its primary asset, the Resort. The court, nevertheless, has considered this possibility and also finds that this possible reorganization plan would be futile. The Fourth Circuit's language in Carolin focuses on a reorganization for continued operations. See Carolin, 886 F.2d at 701-03. The Carolin decision does not purport to limit use of Chapter 11 for such reorganizations, and Chapter 11 often properly is utilized to effect the liquidation of an entity. Nantahala Village, however, has had more than two years to attempt such a "liquidation," beginning with NCNB's August 1988 renegotiation of the debtor's loan agreement. In the two years, both before and after the filing of its bankruptcy petition, Nantahala Village has found no real prospects for purchasing the Resort. The only potential prospect turned out to be an apparent thief, who is now a defendant in an action brought by the debtor over the purported sale of the Resort. Except for this one failed transaction, no contracts for

purchase of the property have been offered, and none is in prospect. In fact, Nantahala Village has failed to make the court aware of any real and specific efforts or activity taken to sell the Resort and, thus, liquidate its assets. Consequently, assuming that liquidation would be a proper use of Chapter 11, liquidation appears futile on the record before this court.

In addition to finding that Nantahala Village has no objective and realistic possibility to reorganize successfully, the court must find that because this debtor did not file its Chapter 11 petition for a proper purpose consistent with the purposes of Chapter 11 of the Bankruptcy Code, the debtor's filing of this Chapter 11 petition was in "bad faith," or not in "good faith."

The principles of Carolin, Little Creek, Landmark and the other cases discussed previously reveal principles relevant to this case. First, although the term "bad faith" may produce images of malfeasance, there is no moral element to that standard in these circumstances. So, the court may find subjective "bad faith" even in the absence of any element of moral turpitude in the debtor's motivation. Here, the debtor's principal, Riedel, appeared to be honest and forthright in every respect. There was nothing evil or unlawful in any of the debtor's actions which he, as its principal, prompted. Riedel, instead, was motivated by his own self-interest, which is understandable. His self-interest, however, does not comport with the proper purposes of the filing of a Chapter 11 petition in the circumstances of this case.

Second, to support a finding of subjective bad faith, the court necessarily must find that the Chapter 11 petition was filed for a purpose other than one that is consistent with the goals of the Bankruptcy Code. See Carolin, 886 F.2d at 702. Because Nantahala Village is a corporate debtor, the "fresh start" principles of the Bankruptcy Code do not apply. See T. Jackson, The Logic and Limits of Bankruptcy 4-5 (1986) (recognizing that corporation is legal fiction and, thus, that there is nothing to be gained by fresh start for fiction, which is reserved for real people). Rather, the fundamental purpose of Chapter 11 is to serve as a debt collection device that solves the "common pool" problem of multiple creditors having claims against debtors having insufficient assets fully to satisfy all of their debts.⁵ So, the fundamental goal of Chapter 11 is to optimize the benefits to creditors. In this case, the only significant creditor is NCNB; the debtor is paying off its trade debt as it is incurred and the only other secured debt is minimal.

In the Chapter 11 scheme of priorities, the interests of owners come last and are protected only when, and if, all other senior interests have been protected. Here, Riedel testified

⁵ There are other related purposes such as preserving jobs for employees and generally benefiting the local community by preserving the existence of an employer. Those factors are not important here, however, because (1) the debtor employs people other than a caretaker only during its season, which last only about 5 months per year, and (2) the property owned by the debtor has only one logical use, which likely would be preserved by any subsequent owner. Thus, the continuing existence of this debtor is not essential to potential employees or the community.

that Nantahala Village filed this bankruptcy petition to preserve his equity in the Resort. Although the preservation of Riedel's equity might be a proper purpose for his own Chapter 11 case, it is not a proper purpose for this debtor, Nantahala Village. The court can conclude only that Nantahala Village filed this bankruptcy petition to frustrate NCNB's efforts to sell the Resort and to obtain more time for Riedel to attempt to maximize his own gain from the sale of the Resort.⁶

Measured against the principles stated above, it appears that Riedel's own statement of his purpose for filing this Chapter 11 petition establishes the debtor's subjective bad faith. The courts in Carolin, Little Creek and the other cases cited above, give extensive, non-exclusive lists of factors which further support this determination. Although not meeting all of those factors, this case does involve enough of them to substantiate further the debtor's subjective bad faith in filing this Chapter 11 petition. First, this is a single-asset bankruptcy and almost exclusively a two-party dispute. No other significant creditors exist or have expressed any interest whatsoever in this proceeding. Second, there were substantial cash transfers from the debtor to insiders, related companies, lawyers, and accoun-

⁶ Another apparent, but unstated, purpose of the purported reorganization was to force upon NCNB the twenty-five year amortization schedule, to which it had refused to agree during arm's length negotiations. Although permitting modification of loans, the Bankruptcy Code does not purport to be a method for a debtor to obtain through the filing of its bankruptcy petition that which it had failed to obtain at the bargaining table, in circumstances such as these.

tants immediately prior to the bankruptcy. While all of these transfers were ostensibly for legitimate purposes, these transfers caused the debtor to have virtually no cash when it filed its Chapter 11 petition. Third, the timing of the bankruptcy filing immediately before a scheduled foreclosure sale demonstrates a purpose of delay, especially after considering the history of litigation in this case. The last minute filing of a bankruptcy petition alone ordinarily may not be sufficient to demonstrate an improper purpose. See Carolin, 886 F.2d at 703. In light of the history in this case, however, that conclusion is inescapable. Fourth, there is some evidence here that Nantahala Village previously had threatened filing for bankruptcy as a negotiation or other tactic. Nantahala Village's "threat" about filing this petition is consistent with its desire to obtain further delay creditors, rather than truly to reorganize its business. Finally, the debtor's "reorganization" goal over the last three years has been to attempt to sell the Resort, and any evidence regarding the future operation of the Resort apparently is a recent construction to defend against NCNB's Motion.

For all of these reasons, the court must find that Nantahala Village filed its Chapter 11 petition in bad faith and must conclude that the findings on the objective futility of reorganization and the subjective bad faith of the debtor justify the court's grant of NCNB's motion for dismissal. For the reasons set forth in part II of this Order, the court has concluded not to order dismissal at this time.

II. NCNB'S MOTIONS TO SELL THE DEBTOR'S PROPERTY

As an alternative form of relief, NCNB has moved the court for an order directing the sale of its collateral, the Resort. The court concludes that both the justifications for dismissing this case and the history of this case compel the court to grant NCNB's motions to sell the debtor's property. Again, the court's discussion of those factors justifying dismissal of this case applies equally to NCNB's motion to sell the debtor's property, but needs not to be repeated here. The debtor's activities effectively have frustrated NCNB's efforts to enforce its contractual and statutory rights in its security for more than two years.

The filing of this bankruptcy case was preceded by: (1) The debtor's agreement to attempt to sell the property in connection with the August 1988 renegotiation of the loan; (2) the March 18, 1990 state court order that the property be sold; and (3) the United States District Court's order that the property be sold. Since the parties first began litigating this dispute over the Resort, NCNB has been prejudiced by its inability to realize on its security as a result of the debtor's activities and by the debtor's continuing default of its obligations. By simply dismissing this case or terminating the stay, the court merely would return NCNB to the position it occupied two years ago and would enable the debtor to continue frustrating NCNB's efforts. Nothing would prohibit or prevent the debtor from repeating the same exact tactics and procedures that it has used for the past two years. The court concludes, consequently, that equity re-

quires an order directing sale of the Resort in connection with this bankruptcy case and the related adversary proceeding. The court can insure that NCNB is afforded the relief to which it is entitled only by issuing such an order.

For those reasons, the court will order the debtor's property to be sold in a manner consistent with the May 10, 1990 Order of the United States District Court.

III. NCNB'S MOTION FOR RELIEF FROM STAY

In addition to seeking a dismissal and an order authorizing the sale of the Resort, NCNB has sought relief from the automatic stay. The record clearly demonstrates sufficient "cause" to justify granting NCNB relief from the automatic stay under 11 U.S.C. § 362(d)(1).

First, NCNB is not adequately protected by the debtor. Although the court has ordered the debtor to make monthly adequate protection payments to NCNB, the debtor now has defaulted on those payments. In approximately two weeks, the Resort will close for the winter, and the debtor then will have no cash flow whatsoever for the next seven months to make the court-ordered adequate protection payments or otherwise to repay its debt. Moreover, the debtor's own projections demonstrate an inability to repay the debt from operations even during the months the Resort is open and operating. Thus, there is nothing in the debtor's forecast that would adequately protect NCNB.

Additionally, although Nantahala Village offered some evidence that the value of the Resort exceeded its debt, the court

does not find that evidence credible. The debtor's "evidence" on the value of the Resort was hearsay opinion at best, was not supported by professional analysis or explanation, and is belied by the absence of any prospective purchasers for the Resort even at prices far below the asserted value. Moreover, Riedel, the debtor's principal, testified that the expenditure of substantial money was necessary to maintain the Resort just in the short run. Consequently, the court finds that NCNB is not adequately protected by the value of the debtor's property, or otherwise.

In addition to being entitled to relief from the stay for not being adequately protected, NCNB is entitled to relief from the stay for "cause." The same factors that support dismissal for lack of good faith -- futility of reorganization and filing for an improper purpose -- constitute "cause" for granting relief from the stay. Those factors fully have been discussed previously, and that discussion applies equally to the relief from stay. Because one natural effect of dismissal would be termination of the stay, those factors justifying dismissal logically also would merit relief from the automatic stay.

For all of these reasons, the court finds and concludes that NCNB is entitled to relief from the automatic stay.

CONCLUSION

The court concludes that: (1) It should hold in abeyance ruling on NCNB's motion for dismissal the debtor's petition and that by so doing this court will retain jurisdiction of this bankruptcy case and the related adversary proceeding; (2) the two

motions for sale of the debtor's property should be granted; and
(3) NCNB's motion for relief from the automatic stay should be granted.

It is therefore ORDERED that:

1. NCNB's motion for dismissal of the debtor's petition is held in abeyance pending further orders of the court as appropriate.

2. NCNB's motion for relief from the automatic stay is granted and the stay provided by U.S.C. § 362(a) is terminated as to NCNB, but only as is consistent with other provisions of this Order;

3. NCNB's motion for the sale of the debtor's property on which it holds a lien is granted and that property shall be sold pursuant to the following terms and conditions:

a. That Fred H. Moody, Jr., Substitute Trustee, or any other subsequent trustee under the Deed of Trust recorded in Book 60 at Page 358 in the Swain County Public Registry, as amended (the "Deed of Trust"), may proceed to give notice of, and conduct a sale of the property of the Debtor pursuant to the provisions of Article 2A of Chapter 45 of the General Statutes of North Carolina, the terms and conditions of the Deed of Trust, and this Order;

b. That the sale by the Substitute Trustee shall be conducted in compliance with the requirements of Chapter 45 of the North Carolina General Statutes and this Order;

c. That the Receiver shall cooperate and assist the Substitute Trustee under the Deed of Trust with the sale as is necessary in the Receiver's discretion;

d. That in accordance with the provisions of North Carolina General Statute §§ 45-21.4, 45-21.22 and 45-21.35, this court hereby dissolves the Order of the United States District Court restraining completion of the previous sale and orders that the resale occur on or before noon on December 5, 1990, on the premises described in the Deed of Trust;

e. That the Receiver is authorized to employ a reputable auction company to assist in the auctioning and advertising of the property. The employment of Daye Realtors & Auctioneers is specifically approved. The Receiver is hereby authorized and directed to pay the reasonable expenses of the auction company and to negotiate a reasonable commission to be paid the auction company. All expenses of the auction company shall be first paid out of the rents and profits under the control of the Receiver. The commission of the auction company (and any expenses otherwise not able to be paid by the Receiver) shall be paid out of the proceeds of the sale, as a taxable expense of the sale;

f. That neither the Receiver nor the Trustee shall be paid a commission on the sale, but rather shall be paid his actual fees and expenses;

g. That the funds under the control of the Receiver shall be used as follows and in the following order of priority: (1) The auctioneer's costs and expenses; (2) the Receiver's fees

and expenses; (3) the upkeep of the property; and (4) the adequate protection payments to NCNB;

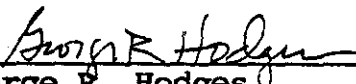
h. That upon completion of the sale, this court shall enter such orders as are appropriate with respect to the \$50,000 Bond (hereafter "the Bond") that the debtor posted in accordance with previous orders issued by the United States District Court;

i. That the entry of this Order shall in no way prejudice or affect the rights of the parties regarding deficiency claims or claims against the Bond;

j. That this court retains jurisdiction to enter such orders as are necessary and appropriate in this matter.

4. This Order shall be filed in the base bankruptcy case and in the related adversary proceeding.

This the 19th day of October, 1990.



George R. Hodges
United States Bankruptcy Judge

OCT 1 1990

WARREN L. TADLOCK, CLERK

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA

In Re:

NANTAHALA VILLAGE, INC.,

Debtor.

NANTAHALA VILLAGE, INC.,

Plaintiff,

v.

NCNB OF FLORIDA, a National
Banking Association, and
FRED H. MOODY, JR.,

Defendants.

Case No. B-B-90-20449
Chapter 11

Adversary Proceeding
No. 90-0208

JUDGMENT

This action was decided by the undersigned and an Order was filed on October 19, 1990. Consistent with that Order,

It is ORDERED and ADJUDGED that NCNB's motion for the sale of the debtor's property on which it holds a lien is granted and that the property shall be sold pursuant to the following terms and conditions:

a. That Fred H. Moody, Jr., Substitute Trustee, or any other subsequent trustee under the Deed of Trust recorded in Book 60 at Page 358 in the Swain County Public Registry, as amended (the "Deed of Trust") may proceed to give notice of, and conduct a sale of the property of the Debtor pursuant to the provisions of Article 2A of Chapter 45 of the General Statutes of

North Carolina and the terms and conditions of the Deed of Trust and this Order;

b. That the sale by the Substitute Trustee shall be conducted in compliance with the requirements of Chapter 45 of the North Carolina General Statutes and this Order;

c. That the Receiver shall cooperate and assist the Substitute Trustee under the Deed of Trust with the sale as is necessary in the Receiver's discretion;

d. That in accordance with the provisions of North Carolina General Statute Sections 45-21.4, 45-21.22 and 45-21.35, this court hereby dissolves the Order of the District Court restraining completion of the previous sale and orders that the resale occur on or before noon on December 5, 1990 on the premises described in the Deed of Trust;

e. That the Receiver is authorized to employ a reputable auction company to assist in the auctioning and advertising of the property. The employment of Daye Realtors & Auctioneers is specifically approved. The Receiver is hereby authorized and directed to pay the reasonable expenses of the auction company and to negotiate a reasonable commission to be paid the auction company. All expenses of the auction company shall be first paid out of the rents and profits under the control of the Receiver. The commission of the auction company (and any expenses otherwise not able to be paid by the Receiver) shall be paid out of the proceeds of the sale, as a taxable expense of the sale;

f. That neither the Receiver nor the Trustee shall be paid a commission on the sale, but rather shall be paid his actual fees and expenses;

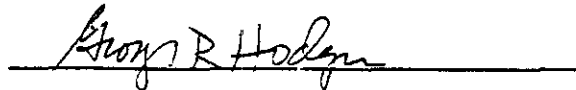
g. That the funds under the control of the Receiver shall be used as follows and in the following order or priority: (1) auctioneer's costs and expenses; (2) Receiver's fees and expenses; (3) upkeep of the property; and (4) adequate protection payments to NCNB;

h. That upon completion of the sale, this court shall enter such orders as are appropriate with respect to the \$50,000 Bond (the "Bond") that the debtor posted in accordance with previous orders issued by the District Court;

i. That the entry of this Order shall in no way prejudice or affect the rights of the parties regarding deficiency claims or claims against the Bond;

j. That this court retains jurisdiction to enter such orders as are necessary and appropriate in this matter.

This the 19th day of October, 1990.



George R. Hodges

United States Bankruptcy Judge

OCT 19 1990

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA

WARREN L. TADLOCK, CLERK

In Re:

NANTAHALA VILLAGE, INC.,

Debtor.

Case No. B-B-90-20449
Chapter 11

JUDGMENT

This action was decided by the undersigned and an Order was filed on October 19, 1990. Consistent with that Order,

It is ORDERED and ADJUDGED that:

1. NCNB's motion for dismissal of the debtor's petition is held in abeyance pending further orders of the court as appropriate.

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3. NCNB's motion for the sale of the debtor's property on which it holds a lien is granted and that the property shall be sold pursuant to the following terms and conditions:

a. That Fred H. Moody, Jr., Substitute Trustee, or any other subsequent trustee under the Deed of Trust recorded in Book 60 at Page 358 in the Swain County Public Registry, as amended (the "Deed of Trust") may proceed to give notice of, and conduct a sale of the property of the Debtor pursuant to the provisions of Article 2A of Chapter 45 of the General Statutes of

b. That the sale by the Substitute Trustee shall be conducted in compliance with the requirements of Chapter 45 of the North Carolina General Statutes and this Order;

c. That the Receiver shall cooperate and assist the Substitute Trustee under the Deed of Trust with the sale as is necessary in the Receiver's discretion;

d. That in accordance with the provisions of North Carolina General Statute Sections 45-21.4, 45-21.22 and 45-21.35, this court hereby dissolves the Order of the District Court restraining completion of the previous sale and orders that the resale occur on or before noon on December 5, 1990 on the premises described in the Deed of Trust;

e. That the Receiver is authorized to employ a reputable auction company to assist in the auctioning and advertising of the property. The employment of Daye Realtors & Auctioneers is specifically approved. The Receiver is hereby authorized and directed to pay the reasonable expenses of the auction company and to negotiate a reasonable commission to be paid the auction company. All expenses of the auction company shall be first paid out of the rents and profits under the control of the Receiver. The commission of the auction company (and any expenses otherwise not able to be paid by the Receiver) shall be paid out of the proceeds of the sale, as a taxable expense of the sale;

f. That neither the Receiver nor the Trustee shall be paid a commission on the sale, but rather shall be paid his actual fees and expenses;


g. That the funds under the control of the Receiver shall be used as follows and in the following order or priority: (1) auctioneer's costs and expenses; (2) Receiver's fees and expenses; (3) upkeep of the property; and (4) adequate protection payments to NCNB;

h. That upon completion of the sale, this court shall enter such orders as are appropriate with respect to the \$50,000 Bond (the "Bond") that the debtor posted in accordance with previous orders issued by the District Court;

i. That the entry of this Order shall in no way prejudice or affect the rights of the parties regarding deficiency claims or claims against the Bond;

j. That this court retains jurisdiction to enter such orders as are necessary and appropriate in this matter.

This the 19th day of October, 1990.



George R. Hodges

United States Bankruptcy Judge